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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY JESUS SOTELO,

Defendant and Appellant.

H045989

(Santa Clara County

Super. Ct. No. B1792232)

Defendant Anthony Jesus Sotelo pleaded no contest to attempted first degree burglary (Pen. Code, §§ 664, 459)<sup>1</sup> and first degree burglary (§ 459). He also admitted that he had a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12). Pursuant to the negotiated plea, the trial court sentenced defendant to nine years four months in prison.

On appeal, defendant's appointed counsel filed an opening brief stating the case and the facts but raising no specific legal issues. Counsel has declared that she notified defendant of her intention to request independent review under *People v. Wende* (1979) 25 Cal.3d 436 and of his right to file written argument on his own behalf, which he has done.<sup>2</sup>

After independent review of the record, and in light of *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), we requested supplemental letter briefs from defendant's

<sup>1</sup> Unspecified statutory references are to the Penal Code.

<sup>2</sup> On June 18, 2019, defendant filed a motion for leave to file a late supplemental argument. We grant the motion and consider defendant's written argument in response to our *Wende* letter.

counsel and the Attorney General about (1) whether the trial court erred in its imposition of any fines or fees without first determining whether defendant had an ability to pay, (2) whether defendant forfeited any such claim of error by failing to object below or waived his right to contest the fines as part of his plea agreement, and (3) if the matter is not forfeit, what is the appropriate remedy on appeal.

Having reviewed the record and the parties' arguments, we conclude that the failure to object to the imposition of the court operations assessment imposed under section 1465.8 and the criminal conviction assessment imposed under Government Code section 70373 did not forfeit the claim on appeal, but any error in imposing the assessments without first determining defendant's ability to pay was harmless beyond a reasonable doubt. We find no other arguable issue and affirm the judgment.

#### **BACKGROUND**

On May 26, 2017, a complaint was filed charging defendant with attempted first degree burglary (§§ 664, 459; count 1) and first degree burglary (§ 459, count 2). The complaint further alleged that defendant had three prior strike convictions (§§ 667, subds. (b)-(i); 1170.12), and two prior serious felony convictions (§ 667, subd. (a)).

On December 1, 2017, defendant pleaded no contest to counts 1 and 2 and admitted one prior strike. The plea was entered with the understanding that the remaining prior strikes and prior serious felony convictions would be dismissed at the time of sentencing, and defendant would be sentenced to a term of nine years four months in prison.

Defendant initialed and signed an advisement of rights, waiver, and plea form. In part, paragraph 18 of the form stated that defendant understood that he "[would] be ordered to pay fines, fees, and costs, which may include: . . . a mandatory restitution fine of not less than \$300 and not more than \$10,000 (plus a 10% county assessment); a probation or parole revocation fine equal to the imposed restitution fine; a court

operations assessment of \$40 per count; a criminal conviction assessment of \$30 per count . . . .” Paragraph 18 went on to state that defendant understood that “[d]epending upon my ability to pay, I may also be required to pay” certain other fines and fees, including a criminal justice administration fee, and he “[did] not contest [his] ability to pay these fines and fees.”

On February 22, 2018, defendant moved to withdraw his plea on the basis that he had not agreed to the nine-year, four-month sentence. The trial court denied his motion. Subsequently, defendant informed the trial court that he wanted to fire his attorney, which the trial court did not permit.

Thereafter, the trial court sentenced defendant to a term of 16 months for count 1, consecutive to a term of eight years for count 2. The trial court ordered defendant to pay \$4,550 in restitution to the victim, jointly and severally with his codefendant. The trial court further ordered defendant to pay a \$300 restitution fine under section 1202.4, subdivision (b), a \$80 court operations assessment under section 1465.8, and a \$60 criminal conviction assessment under Government Code section 70373. The trial court ordered defendant to supply “buccal swab samples, prints, blood specimens, and/or other biological samples,” but did not impose the associated \$10 fine “based on inability to pay.” The trial court also waived the “Criminal Justice Administration Fee to the County based on inability to pay.” The remaining strike priors and prior serious felony convictions were dismissed, and the trial court granted defendant 532 days of presentence custody and conduct credit.<sup>3</sup>

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<sup>3</sup> On March 5, 2019, appellate counsel sent the trial court a letter requesting correction of defendant’s presentence credits. After considering appellate counsel’s request, the trial court corrected its minute order and granted defendant 532 days of presentence conduct and custody credit.

## DISCUSSION

### 1. *Defendant's Argument*

In his supplemental argument, defendant argues that his plea was not entered voluntarily. He claims that his attorney lied to him and coerced him to enter into the plea agreement. He further argues that he was not permitted to file a *Romero* motion.<sup>4</sup> Based on our review of the record, we conclude that defendant's arguments are barred by his failure to obtain a certificate of probable cause as required by section 1237.5 and rule 8.304 of California Rules of Court.

### 2. *Ability to Pay Fines and Fees*

In his supplemental brief, defendant argues that under the reasoning articulated in *Dueñas, supra*, 30 Cal.App.5th 1157, the trial court should not have imposed the \$80 court operations assessment and the \$60 criminal conviction assessment without first determining his ability to pay.<sup>5</sup> Defendant further argues that his failure to object to the assessments below on the basis of his inability to pay did not forfeit the issue on appeal.

#### a. *Dueñas*

In *Dueñas*, the defendant was an unemployed homeless probationer with cerebral palsy who spent her benefits and food stamps on her two children. (*Dueñas, supra*, 30 Cal.App.5th at pp. 1160-1161.) The defendant had received juvenile citations when she was a teenager, which led to fines, which led to her driver's license getting suspended

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<sup>4</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

<sup>5</sup> Defendant's supplemental brief addresses only the court operations assessment and the criminal conviction assessment. The Attorney General does not challenge *Dueñas* to the extent it "prohibits the imposition of nonpunitive fees upon a defendant who is financially unable to pay them." The Attorney General, however, argues that *Dueñas* incorrectly analyzed the constitutionality of the \$300 restitution fine using due process principles when the fine should be first examined under the excessive fines clause of the Eighth Amendment. We do not reach this argument because defendant does not raise the restitution fine in his supplemental brief.

after she could not repay her debts. (*Id.* at p. 1161.) She was then convicted several times for driving with a suspended license, which resulted in her spending time in jail because she could not afford paying the fines associated with her convictions. (*Ibid.*) After her most recent conviction of driving with a suspended license, the defendant requested that the trial court set a hearing to determine her ability to pay the attorney fees that had been previously assessed and other court fees. (*Id.* at p. 1162.) After an ability-to-pay hearing, the trial court determined that the defendant lacked the ability to pay attorney fees and waived them. (*Id.* at p. 1163.) The trial court, however, determined that the criminal conviction assessment imposed under Government Code section 70373 and the court operations assessment imposed under section 1465.8 were mandatory regardless of the defendant's ability to pay, and the defendant had not shown the "compelling and extraordinary reasons" required by section 1202.4, subdivision (c) to justify waiving the fine. (*Dueñas, supra*, at p. 1163.)

On appeal, the Second Appellate District reversed the trial court's order. (*Dueñas, supra*, 30 Cal.App.5th at p. 1164.) With respect to the criminal conviction and court operations assessments, *Dueñas* first observed that both assessments were not intended to be punitive in nature. (*Id.* at p. 1165.) *Dueñas* then examined several California and United States Supreme Court decisions involving indigent defendants and fees: *Griffin v. Illinois* (1956) 351 U.S. 12, which held that due process and equal protection principles require that all people charged with a crime be treated equally, *In re Antazo* (1970) 3 Cal.3d 100, which invalidated the practice of requiring defendants to serve jail time if they were unable to pay a fine and penalty assessment, and *Bearden v. Georgia* (1983) 461 U.S. 660, which held that it violated the federal Constitution to revoke an indigent defendant's probation for failing to pay a fine and restitution. (*Dueñas, supra*, at pp. 1166-1169.) Relying on these three cases, *Dueñas* held that imposing the criminal

conviction and court operations assessment without determining a defendant's ability to pay was fundamentally unfair and violated due process. (*Id.* at pp. 1168-1169.)

**b. The Plea Form**

The Attorney General argues that defendant expressly waived any challenge to the imposition of his fines and fees when he initialed and signed his plea form. We disagree with the Attorney General's characterization of the plea form.

In part, paragraph 18 of defendant's plea form stated that defendant understood that he "[would] be ordered to pay fines, fees, and costs, which may include: . . . a mandatory restitution fine of not less than \$300 and not more than \$10,000 (plus a 10% county assessment); a probation or parole revocation fine equal to the imposed restitution fine; a court operations assessment of \$40 per count; a criminal conviction assessment of \$30 per count . . . ." Paragraph 18 went on to state that defendant understood that "[d]epending upon my ability to pay, I may also be required to pay" certain other fines and fees, including a criminal justice administration fee, and he "[did] not contest [his] ability to pay these fines and fees."

Based on the plea form, defendant indicated that he would not contest his ability to pay certain fines and fees, which did not include the court operations assessment or the criminal conviction assessment. Defendant only indicated that he understood he would be ordered to pay the court operations assessment and the criminal conviction assessment. Therefore, we decline to find that the plea form waives his claim.

**c. Forfeiture**

Typically, a failure to object to fines and fees in the trial court forfeits the issue on appeal. (See *People v. Aguilar* (2015) 60 Cal.4th 862, 864.) The Attorney General argues that defendant has forfeited his argument because he did not object below. Defendant disagrees and urges us not to find forfeiture.

Presently, there is a split among the appellate courts as to whether a defendant who was sentenced before *Dueñas* was decided forfeits a challenge to the imposition of fines and fees on the basis of inability to pay by failing to object below. In *People v. Frandsen* (2019) 33 Cal.App.5th 1126, the Second Appellate District held that a failure to object to the imposition of assessments and restitution fines forfeited the issue on appeal because the decision in *Dueñas* was foreseeable and applied “law that was old, not new.” (*Id.* at p. 1155.) *Frandsen* was followed by a different panel of the same division of the Second Appellate District in *People v. Bipialaka* (2019) 34 Cal.App.5th 455.

In contrast, in *People v. Castellano* (2019) 33 Cal.App.5th 485, a different division of the Second Appellate District concluded that a failure to object to fines and fees did not forfeit the issue because *Dueñas* had not yet been decided at the time of the defendant’s sentencing and no California court prior to *Dueñas* had held it was unconstitutional to impose the challenged fines and fees without making a determination of the defendant’s ability to pay. (*Id.* at p. 489.) And more recently, the First Appellate District in *People v. Johnson* (2019) 35 Cal.App.5th 134 (*Johnson*) and the Fourth Appellate District in *People v. Jones* (2019) 36 Cal.App.5th 1028 (*Jones*) similarly concluded that failure to object to fines and fees below did not forfeit the issue on appeal.

We agree with *Castellano*, *Johnson*, and *Jones* and find that defendant’s failure to object below did not forfeit his arguments on appeal. The statute authorizing the imposition of the assessments at issue did not permit the trial court to consider a defendant’s ability to pay. Trial counsel cannot have been reasonably expected to object to the imposition of the fines before *Dueñas* was decided. (See *People v. Black* (2007) 41 Cal.4th 799, 810 [failure to object does not forfeit issue if change in law was unforeseeable and it is not reasonable to expect trial counsel to anticipate change].)

**d. Any Error Was Harmless**

Assuming without deciding that *Dueñas* was correctly decided, any alleged error in the imposition of the court operations assessment and the criminal conviction assessment is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Johnson, supra*, 35 Cal.App.5th at p. 140; *Jones, supra*, 36 Cal.App.5th at p. 1035.)

We acknowledge that the record in this case contains scant information about defendant's financial information or employment history, and the trial court ultimately decided not to impose a testing fee and the criminal justice administration fee based on defendant's inability to pay. Defendant, however, was sentenced to a term of nine years four months in prison, with 532 days of presentence custody and conduct credit. "Wages in California prisons currently range from \$12 to \$56 a month." (*Jones, supra*, 36 Cal.App.5th at p. 1035.) Since the challenged assessments total \$140, defendant will have sufficient time to earn this amount while incarcerated even if we assume that he will earn only the minimum wage.

As a result, we find any argument that defendant is unable to pay the challenged assessments is foreclosed. (*Jones, supra*, 36 Cal.App.5th at p. 1035 [*Dueñas* error harmless beyond a reasonable doubt when defendant was sentenced to six years in prison and ordered to pay \$370 in fines and fees]; *Johnson, supra*, 35 Cal.App.5th at p. 140 [*Dueñas* error harmless beyond a reasonable doubt when defendant was sentenced to eight years in prison and ordered to pay \$370 in fines and fees]; *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837 [ability to pay includes a defendant's prison wages].)

**DISPOSITION**

The judgment is affirmed.



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Premo, J.

WE CONCUR:

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Greenwood, P.J.

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Elia, J.